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IN THE

Supreme Court of the United States

[illegible]

Defendants-Appellants,

vs.

[illegible]

Plaintiff-Appellee.

On Appeal from the United States District Court for the Western District of Oklahoma.

MOTION TO DISMISS OR AFFIRM

[illegible]

IN THE

Supreme Court of the United States

No. 1089

G. T. BLANKENSHIP, OLIVER HODGE and JIM COOK, individually and as the Oklahoma Literature Commission, CHARLES NESBITT, as Attorney General of the State of Oklahoma, and CURTIS HARRIS, individually and as an officer of the State of Oklahoma, County Attorney of Oklahoma County,

Defendants-Appellants,

vs.

ARTHUR C. HOLDING, d/b/a GRAND NEWS,

Plaintiff-Appellee.

On Appeal from the United States District Court for the Western District of Oklahoma.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee Arthur C. Holding, d/b/a "Grand News," moves that this appeal be dismissed or that the judgment of the District Court be summarily affirmed.

Statement

The facts are adequately set forth in the District Court's opinion which is appended to the Jurisdictional Statement.

The Questions Presented Are Not Substantial

In holding certain sections of the Oklahoma Literature Commission statute (21 O.S. §§1040.1 to 1040.10) unconstitutional, the three-judge District Court correctly applied the principles established by decisions of this Court. The Court's ruling is so clearly correct that plenary review by this Court is unnecessary.

The provisions of the Oklahoma statute which the District Court held repugnant to the Constitution of the United States are (1) the last sentence of Section 1040.3, which authorizes the Oklahoma Literature Commission to enter orders "prohibiting the sale or distribution of any literature it finds to be obscene . . . ," and (2) Section 1040.6, which provides that any person who violates any order of the Commission is guilty of a misdemeanor.*

The decision of the District Court is obviously correct. These provisions of the Oklahoma statute are far more repressive to freedom of expression than the activities of the Rhode Island Commission whose activities were condemned in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). In *Bantam Books,* the Commission brought pressure to bear on booksellers to cease handling books which the Commission had disapproved. The Commission made its message clear by the suggestion—but not actual threat—of criminal prosecution. This was done *without statutory authority.* The majority of this Court held that these practices

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* Appellants do not challenge the District Court's holding that the definition of "obscene literature" in 21 O.S. §1040.1(b) is unconstitutional.

"were performed under color of state law," and "directly and designedly stopped the circulation of publication in many parts of Rhode Island" (372 U.S. at 68), and concluded that "the system of informal censorship disclosed by this record violates the Fourteenth Amendment" (372 U.S. at 71).

In contrast, in the case at bar, the statute expressly commands the Oklahoma Commission to issue orders that the sale or distribution of allegedly obscene literature be stopped under explicit threat of criminal prosecution, and provides that violation of such an order is a separate crime.

Mr. Justice Clark, concurring in the result in *Bantam Books,* described the Commission's conduct as follows:

> ". . . the Commission *assumed the prerogative* of issuing an 'order' to the police that certain publications which it deemed obscene are 'not to be sold, distributed, or displayed to youths under eighteen years of age' and stated that '[t]he Attorney General will act for us in case of non-compliance.' " (372 U.S. at 75; emphasis added.)

Mr. Justice Clark observed that these orders stemmed not from any statutory basis but rather from the Commission's own "delusions of grandeur." (372 U.S. at 75.)

In sharp contrast, in Oklahoma the Commission acts not merely from "delusions of grandeur," but in compliance with a direct and unequivocal *statutory mandate* to issue such orders. Thus, in the case at bar, the Commission is under an affirmative statutory duty to issue the very same kinds of illegally coercive orders which the Rhode Island Commission issued solely by administrative fiat. The District Court accurately described the Oklahoma Literature Commission statute as being "even more objectionable than the act of the Rhode Island Legislature." (Appendix to Appellant's Jurisdictional Statement, xiii.)

Mr. Justice Harlan, dissenting in *Bantam Books,* said (372 U.S. at 77):

> ". . . I agree with the Court that the tenor of some of the Commission's letters and reports is subject to serious criticism, carrying as they do an air of authority which that body does not possess and conveying an impression of consequences which by no means may follow from non-cooperation with the Commission. But these are things which could surely be cured by a word to the wise. . . ."

As observed above, in the case at bar the Commission's orders are based upon the statutory grant of authority which the District Court struck down as repugnant to the Constitution. Moreover, there is no doubt about the consequences which will follow if the "offending party" does not knuckle under to the Commission's orders. The statute directs the Commission to deliver its findings and evidence to the local County Attorney with a recommendation for prosecution of those who do not accept the Commission's findings. (21 O.S. §1040.4.) Even worse, the statute gives the Commission's orders the force of law, so that violators of an *order* are guilty of a crime. (21 O.S. §1040.6.) The Commission takes full advantage of these bludgeons. The proposed order entered by the Commission and served on appellee states (Appendix 1 to this brief):

> "It is therefore ordered by the Oklahoma Literature Commission that each of the above-listed books and literature be and the same are hereby declared to be obscene; that the sale or distribution thereof is prohibited, effective upon entry of a final order thereon; that in the event any person having due notice of the order of this Commission prohibiting such sale shall thereafter sell or distribute the same, this Commission will recommend prosecution of the offending par-

ties; that notice by certified mail be given the above-named persons, firms and corporations by mailing copies of this Order; that the Commission will enter a final Order herein ten (10) days from the date of entry of these findings, which final order will prohibit the further sale of such literature, and thereafter the Commission will recommend prosecution for any continued sale or distribution of this literature subsequently occurring by any party having notice thereof."

In the trial for violation of a Commission order, there is no issue as to whether books are in fact obscene, or of the defendant's knowledge of the contents of the book (cf. *Smith* v. *California*, 361 U.S. 147 (1959)), but only whether the defendant sold the condemned books after receiving notice of the order. These practices are clearly designed to force compliance with and make final the judgments of the Commission. Applicable here is what this Court said in *Bantam Books* (372 U.S. at 69-70):

"... The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

If additional support were needed for the decision of the District Court, it is found in the further holding that the procedures prescribed in the Oklahoma Administrative Procedures Act for appeals from the findings of the Commission (75 O.S. §§301-325) do not comport with minimum standards required by the United States Constitution, as defined in cases such as *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1964), and *Freedman* v. *Maryland,* 380 U.S. 51 (1965).

Conclusion

The decision of the three-judge District Court is so clearly correct that this appeal should be dismissed or the judgment summarily affirmed.

Respectfully submitted,

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March, 1967.

APPENDIX 1

BEFORE THE OKLAHOMA LITERATURE COMMISSION

IN RE: Certain Items of Literature Offered

Summer Heat—Morgana Garson
Night Train to Sodom—Tony Calvano
That Kind of Girl—Stanley Carson
The Abnormal Ones—Herbert O. Truett
The Strange Ones—Ken Travis
Naked in the Night—Ken Michaels
Sodom—Johnny Shearer
Man for Hire—Robert M. Green
Sister for Sale—Stanley Carson
Cargoes Syngin—John Cass
The Pants—George M. Nye
Two-Way Mirror—Mark Barnes
The Pleasure Salesman—Ken Shearer
Strange Desires—Ken Shearer

APPENDIX

FINDINGS OF THE COMMISSION AND NOTICE OF PROPOSED ORDER

On this the 28th day of March, 1956, the Oklahoma Literature Commission, meeting in regular session, proceeded to hear fourteen (14) separate complaints as to items of literature offered to its observers, as listed below:

Summer Heat—Morgana Garson
Night Train to Sodom—Tony Calvano
That Kind of Girl—Stanley Carson
The Abnormal Ones—Herbert O. Truett
The Strange Ones—Ken Travis
Naked in the Night—Ken Michaels
Sodom—Johnny Shearer

APPENDIX 1

BEFORE THE OKLAHOMA LITERATURE COMMISSION

IN RE: Certain items of literature, to-wit:

Summer Heat—Morgana Garson
Night Train to Sodom—Tony Calvano
That Kind of Girl—Stanley Curson
The Abnormal Ones—Herbert O. Pruett
The Strange Ones—Ben Travis
Naked in the Night—Rea Michaels
Sodom—Johnny Shearer
Man for Hire—Robert N. Owen
Sister for Sale—Stanley Curson
Campus Nymphs—John Carver
The Tease—George McNeill
Two-Way Mistress—Mark Savage
The Pleasure Salesman—Gus Stevens
Strange Desire—Wayne Wallace

FINDINGS OF THE COMMISSION AND NOTICE OF PROPOSED ORDER

On this the 28th day of March, 1966, the Oklahoma Literature Commission, meeting in regular session, proceeded to hear fourteen (14) separate complaints as to items of literature alleged to be obscene, as listed below:

Summer Heat—Morgana Garson
Night Train to Sodom—Tony Calvano
That Kind of Girl—Stanley Curson
The Abnormal Ones—Herbert O. Pruett
The Strange Ones—Ben Travis
Naked in the Night—Rea Michaels
Sodom—Johnny Shearer

Man for Hire—Robert N. Owen
Sister for Sale—Stanley Curson
Campus Nymphs—John Carver
The Tease—George McNeill
Two-Way Mistress—Mark Savage
The Pleasure Salesman—Gus Stevens
Strange Desire—Wayne Wallace

The complainants on all of the above complaints appeared either in person or by counsel. Those persons, firms or corporations named herein who are alleged to have sold or distributed the above publications appeared either in person or by counsel.

The Commission first found that due notice of this hearing had been given all interested parties as required by law and the rules and regulations of the Commission.

The complainants proceeded to give evidence of the purchase, sale, and distribution in Oklahoma of all the above-described literature alleged to be obscene. Opportunity was afforded all parties to cross-examine the witnesses, present evidence and argument upon the issues involved. Documentary evidence in the form of the books attached to the complaints was received in evidence. Judicial cognizance was taken of the contents of the literature alleged to be obscene in view of the fact that such literature had been read by the members of the Commission prior to the hearing.

The Oklahoma Literature Commission, at the close of all evidence and argument, and being fully advised in the premises, finds that each of the above-named publications has been publicly sold, offered for sale, and distributed for public sale within the State of Oklahoma and Oklahoma County.

The Commission separately finds each of the above-named publications to be obscene, as defined by the statutes and laws of Oklahoma.

The Commission further finds that the sale, offer for sale, or distribution of each of the above-named publications should hereafter be prohibited, in the manner provided by law.

The Commission further finds that it should recommend criminal prosecution for any future sale or distribution of any of such publications occurring after the effective date of the order of this Commission prohibiting such sale, by any person having received official notice thereof.

The Commission further finds that the following named: Rector's Book Store, 133 W. Main Street, Oklahoma City, Oklahoma; Mid-Continent News Company, 7101 N. Boadway Expressway, Oklahoma City, Oklahoma; Grand News, 307 W. Sheridan, Oklahoma City, Oklahoma; Tom's Market, 102, 444 N. W. 1st, Moore, Oklahoma; Taylor News Stand, 221 N. Robinson, Oklahoma City, Oklahoma, should be notified of these findings of the Commission in regard to the above-described literature, and that at the expiration of ten days after the entry of these findings, a final order shall be made by the Commission prohibiting further sale and distribution thereof.

The Commission further finds that a copy of these findings shall be mailed by certified mail to each of the above-named parties immediately upon entry thereof.

It is therefore ordered by the Oklahoma Literature Commission that each of the above-listed books and literature be and the same are hereby declared to be obscene; that the sale or distribution thereof is prohibited, effective upon entry of a final order thereon; that in the event any person

having due notice of the order of this Commission prohibiting such sale shall thereafter sell or distribute the same, this Commission will recommend prosecution of the offending parties; that notice by certified mail be given the above-named persons, firms and corporations by mailing copies of this Order; that the Commission will enter a final Order herein ten (10) days from the date of entry of these findings, which final order will prohibit the further sale of such literature, and thereafter the Commission will recommend prosecution for any continued sale or distribution of this literature subsequently occurring by any party having notice thereof.

OKLAHOMA LITERATURE COMMISSION

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Chairman

.....

Member

ATTEST:

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Secretary

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

BLANKENSHIP ET AL. *v.* HOLDING

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 1089. Decided May 15, 1967.

PER CURIAM.

Probable jurisdiction noted. The judgment of the District Court for the Western District of Oklahoma entered November 4, 1966, is affirmed insofar as it adjudged provisions of §§ 1040.1 to 1040.10 of Title 21 of the Oklahoma Statutes to be unconstitutional.